PD-1072-19
COURT OF CRIMINAL APPEALS
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NO. PD-1072-19

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
12/16/2019
DEANA WILLIAMSON, CLERK

DANIEL THOMAS BARNES,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

On Appeal from Cause Number 48046-A
In the 188th Judicial District Court of Gregg County, Texas and
Cause Number 06-19-00045-CR
In the Court of Appeals for the Sixth Judicial District of Texas.

BRIEF FOR THE STATE

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ORAL ARGUMENT NOT REQUESTED

Identity of Judge, Parties, and Counsel

Pursuant to Tex. R. App. P. 68.4(a) (2014), the Judge, parties, and counsel in this suit are:

TRIAL JUDGE:	**The Honorable J. Scott Novy** **188th Judicial District Court** **Longview, Texas**
APPELLANT:	**Daniel Thomas Barnes**
APPELLEE:	**The State of Texas**
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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

DANIEL THOMAS BARNES,……Appellant

v.

THE STATE OF TEXAS,……..…….....Appellee

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through its Criminal District Attorney for Gregg County, and respectfully presents to this Court its brief on the merits in the named cause.

STATEMENT OF THE CASE

Appellant was charged by indictment on November 1, 2018 in Cause Number 48046-A with one count of burglary of a habitation with intent to/commission of theft. [CR-I-4]. On February 26, 2019 the State filed notice of its intention to enhance Appellant's charge due to a prior felony conviction to a first degree felony. [CR-I-24-25]. That same day Appellant's case was called for trial before the court. [RR-IV-1]. The trial

court found Appellant guilty. [RR-IV-172]. In the punishment section of the trial, the trial court admitted, over Appellant's objection, State's Exhibits 22 and 23, certified copies of the judgments of two prior out of state convictions alleged to belong to Appellant. [RR-IV-201-202]. The trial court found the enhancement allegation true [RR-IV-214] and sentenced Appellant to 40 years in prison. [RR-IV-216]. On September 25, 2019, the Sixth Court of Appeals (hereafter Court of Appeals) reversed the trial court ruling in part as to the punishment segment of the trial and remanded the case for a new punishment hearing. *Barnes v. State,* 585 S.W.3d 643, No. 06-19-00045-CR, 2019 Tex. App. LEXIS 8578 (Tex. App.-Texarkana 2019, pet. granted). On October 7, 2019 the State submitted a petition for discretionary review to this court. On December 11, 2019 this court granted the State's petition as to Ground 2.

ISSUES PRESENTED

I. Did the Court of Appeals so far departed from the accepted and usual course of judicial proceedings in finding that there was harm from the admission of State's Exhibits 22 and 23 as to call for an exercise of the Court of Criminal Appeals' power of supervision

STATEMENT OF THE FACTS

On November 1, 2018 Appellant was charged by indictment with a single count of burglary of a habitation, alleged under two paragraphs, Paragraph A (burglary of a habitation with intent to commit theft) and Paragraph B (burglary of a habitation with commission of theft.) [CR-I-4]. On February 25, 2019 Appellant waived his right to trial by jury and the case was set for a contested trial before the court. [CR-I-26, RR-III-5-8]. On February 26, 2019 the State filed notice of its intention to enhance Appellant's case to a first degree felony due to him having a prior final felony conviction. [CR-I-24-25].

Appellant's case was called for trial on February 26, 2019. [RR-IV-1]. During the trial, the State called the victim of the offense, Mr. Michael Minshew. [RR-IV-28]. Mr. Minshew described how the offender destroyed things all over his house, spread oil throughout his property, and destroyed items he could not replace. [RR-IV-29-30]. Mr. Minshew then described how the offender stole rifles, jewelry, electronic items, clothing, a golf cart, and even stole the rings that Mr. Minshew's eight year old son had earned playing baseball. [RR-IV-31-32].

The trial court found Appellant guilty under Paragraph A of the indictment. [RR-IV-172]. The case then proceeded to the punishment

section of the trial. [RR-IV-174], and the State again called Mr. Minshew. [RR-IV-175].

Mr. Minshew described how the offense was not only a tremendous inconvenience to him but also how it was terrifying to his wife and children. [RR-IV-175]. Mr. Minshew also described how his family permanently lost professional photographs that were destroyed during the offense and that it had directly cost him more than $10,000 to make good on his losses from the offense. [RR-IV-176]. Mr. Minshew also testified that it was difficult even convincing him wife and children to return to the home after the burglary. [RR-IV-177].

The State then called Detective James Bray of the Longview Police Department to testify. [RR-IV-178]. Detective Bray explained what the Aryan Brotherhood was [RR-IV-180] and then testified that he believed Appellant was a member of that gang. [RR-IV-181]. Detective Bray then specifically noted that Appellant had a swastika, lightning bolts, the words, "Aryan Pride", and the letters "G-F-T-B-D-", believed to stand for "God forgives. The Brotherhood doesn't", tattooed on his body. [RR-IV-182]. Detective Bray also established that the Aryan Brotherhood is a white supremacist group [RR-IV-182] and that they are violent and a danger to the community. [RR-IV-182-183].

The State then called Investigator Hall Reavis of the Gregg County Criminal District Attorney's Office. [RR-IV-187]. Investigator Reavis sponsored into evidence the admission of State's Exhibits 18-24, records of prior judgments of Appellant. [RR-IV-196, 200, 202.]

State's Exhibit 18 included a certified copy of the judgment against Appellant in Cause Number 10ML-CR00132-01 out of the Circuit Court of Miller County, Missouri for three counts of felony forgery. [State's Exhibit 18]. State's Exhibit 18 also showed that Appellant was originally placed on community supervision for all three counts but on June 8, 2011 had that community supervision revoked and was sentenced to five years imprisonment on each count. [State's Exhibit 18, pages 5-6].

State's Exhibit 19 included a certified copy of the sentence against Appellant in Cause Number 09 CF 1308 out of the Circuit Court of the 18th Judicial Circuit of Du Page County, Illinois for the felony offense of unlawful possession of a controlled substance. [State's Exhibit 19].

State's Exhibit 20 included a certified copy of the judgment against Appellant in Cause Number 2008-C-0210 out of the County Court at Law of Panola County, Texas for a felony state jail theft. [State's Exhibit 20]. State's Exhibit 20 included Appellant's signature on multiple documents. [State's Exhibit 20, pages 1, 3-4, 7, 10-11, 13, 15]. State's Exhibit 20

further showed that Appellant was originally placed on deferred adjudication community supervision in that case [State's Exhibit 18, pages 1-3] and that he was unsuccessful on community supervision and was adjudicated to regular community supervision. [State's Exhibit 18, pages 5-7] after which he was unsuccessful again and was revoked and sentenced to two years confinement in a state jail facility. [State's Exhibit 18, pages 17-18].

State's Exhibit 21 included a certified copy of the judgment against Appellant in Cause Number 44,098-A out of the 188th Judicial District Court of Gregg County, Texas for a felony state jail offense of burglary of a building. [State's Exhibit 20]. State's Exhibit 21 included Appellant's signature on the judgment. [State's Exhibit 21, page 4.]

State's Exhibit 22 included a certified copy of the judgment against Appellant in Warrant Number GS422077 out of the Criminal Court of Davidson County, Tennessee for the misdemeanor offense of Theft. [State's Exhibit 22]. State's Exhibit 22 included Appellant's signature on the judgment. [State's Exhibit 22, page 1.] State's Exhibit 22 shows that Appellant was placed on community supervision for this offense. [State's Exhibit 22, page. 1].

State's Exhibit 23 included a certified copy of the judgment against Appellant in Warrant Number GS422076 out of the Criminal Court of

Davidson County, Tennessee for the misdemeanor offense of Forgery. [State's Exhibit 23]. State's Exhibit 23 included Appellant's signature on the judgment. [State's Exhibit 23, page 1.] State's Exhibit 23 shows that Appellant was placed on community supervision for this offense. [State's Exhibit 22, page. 1].

State's Exhibit 24 included a certified copy of the judgment against Appellant in Cause Number 2009-1620 out of the County Court at Law of Gregg County, Texas for the misdemeanor offense of Criminal Trespass. [State's Exhibit 24]. State's Exhibit 24 included the signature of Appellant. [State's Exhibit 24, page 2].

Appellant objected to the admission of State's Exhibits 18-24 on the grounds that the State had failed to link the judgments to Appellant. [RR-IV-195, 200-201].

Appellant rested without putting on any evidence. [RR-IV-207]. At no point in the trial did Appellant ever deny that the signatures on State's Exhibits 22 and 23 were his. [RR-IV].

The State's closing argument only briefly mentioned State's Exhibits 22 and 23 [RR-IV-210] and noted that Appellant had four prior felony convictions as well as some misdemeanor convictions. [RR-IV-212-213].

Appellant's closing argument emphasized Appellant's need for rehabilitation and discussed his time at a SAF-P treatment facility. [RR-IV-211-212].

The trial court found the enhancement paragraph allegation true. [RR-IV-214]. In pronouncing sentence the trial court noted that other states had given Appellant chances to rehabilitate himself. [RR-IV-215]. The trial court then noted Mr. Minishaw's testimony and stated that Mr. Minishaw testified as to how the crime had affected him in a manner similar to what the court had seen from victims of sexual assault describing how badly they were traumatized. [RR-IV-215]. The trial court then assessed Appellant's punishment at 40 years imprisonment. [RR-IV-216].

SUMMARY OF THE ARGUMENT

The Court of Appeals erred in finding harm from the admission of State's Exhibits 22 and 23 because any error from the admission of those documents was plainly harmless given the overwhelming other inculpatory evidence presented which supported the trial court's punishment verdict. The evidence presented at trial showed that Appellant had committed a particularly egregious burglary which inflicted severe financial and psychological harm on the victims, that Appellant had an extensive criminal history (including five prior felony convictions), that Appellant was unlikely

to respond to any attempt at rehabilitation (since he had already failed at community supervision twice before), and that Appellant belonged to a violent, white supremacist organization. Given this great volume of other inculpatory evidence, and the trial court's own statement when pronouncing sentencing (which emphasized the victim's distress while testifying) it is simply not believable that evidence that Appellant had two prior non-violent misdemeanor convictions had any impact on the trial court's verdict. Therefore there is fair assurance that any error from the admission of State's Exhibits 22 and 23 was harmless and thus any such error should have been disregarded.

ARGUMENT

I. The Court of Appeals erred in finding harm from the admission of State's Exhibits 22 and 23.

A. Legal standard for analyzing errors governing the erroneous admission of extraneous offense evidence

The erroneous admission of extraneous offense evidence is non-constitutional error which must be reviewed for harm under Texas Rule of Appellate Procedure 44.2(b). See *Sandoval v. State,* 409 S.W.3d 259, 304 (Tex. App.-Austin 2013, no pet.); *Johnson v. State,* 84 S.W.3d 726, 729 (Tex. App.-Houston [1st Dist.] 2002, pet. ref'd.); *Avila v. State,* 18 S.W.3d 736, 741-742 (Tex. App.-San Antonio 2000, no pet.) Under Rule 44.2(b),

any error which did not affect the substantial rights of a defendant must be disregarded. *Haley v. State,* 173 S.W.3d 510, 518 (Tex. Crim. App. 2005). A substantial right is affected only when the error had a substantial and injurious effect or influence in determining the verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). Thus a trial court's verdict should not be overturned for such error if, after examining the record as a whole, there is fair assurance that the error did not influence the verdict or had only slight effect. See *Johnson v. State,* 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).

With that legal framework in mind it is clear that the Court of Appeals erred in finding harm from the admission of State's Exhibits 22 and 23.

B. Any error from the admission of State's Exhibits 22 and 23 was harmless given the overwhelming evidence supporting the trial court's verdict.

There was overwhelming evidence to support the trial court's verdict in this case and given that overwhelming evidence there is fair assurance that any error from the improper admission of State's Exhibits 22 and 23 did not influence the trial court's verdict or at most had only a slight effect.

The evidence properly admitted at trial established that the charged offense was a particularly egregious burglary. Appellant not only broke into Mr. Minshew's home and stole a great many items (including firearms) [RR-

IV-31] but also inflicted substantial and entirely gratuitous damage on Mr. Minshew's residence with Appellant effectively destroying the residence. [RR-IV-29-30]. The damage inflicted was so severe that Mr. Minishew estimated that even after taking insurance into account he was still out more than $10,000 to repair his home. [RR-IV-176].

Nor was the harm Appellant inflicted on the Minshew family simply monetary as Appellant's offense also greatly traumatized Mr. Minshew and his family. Mr. Minshew testified as to how badly the burglary affected his wife and children with them being afraid to come home even after the residence was repaired. [RR-IV-175, 177]. It is also obvious from the trial record that the trial court was powerfully affected by Mr. Minshew's testimony, as the trial court noted when pronouncing sentence that Mr. Minshew's demeanor on the stand was comparable to what the judge had previously seen from victims of sexual assault. [RR-IV-215]. Thus this was obviously a very serious crime that imposed severe financial and psychological harm on the victims.

Appellant was also shown to have substantial criminal history separate from the two misdemeanor convictions reflected in State's Exhibits 22 and 23.

Appellant's Prior Convictions

Exhibit	State	Court	Cause Number	Offense	Offense Level	Sentence
18	Missouri	26th Judicial Circuit Court of Miller County	10ML-CR00132-01 (Count 1)	Forgery	Felony C	8-16-10 (5 years supended) 6-8-11 (revoked for 5 years incarceration)
18	Missouri	26th Judicial Circuit Court of Miller County	10ML-CR00132-01 (Count 2)	Forgery	Felony C	8-16-10 (5 years supended) 6-8-11 (revoked for 5 years incarceration)
18	Missouri	26th Judicial Circuit Court of Miller County	10ML-CR00132-01 (Count 3)	Forgery	Felony C	8-16-10 (5 years supended) 6-8-11 (revoked for 5 years incarceration)
19	Illinois	Circuit Court of the 18th Judicial Circuit, County of Du Page	09CF1308	Unlawful Possession of Controlled Substance	Class 4 Felony	6-9-09 (24 months probation)
20	Texas	County Court at Law of Panola County	2008-C-0210	Theft	State Jail Felony	1-08-09 (3 years deferred adjudication) 7-22-09 (adjudicated for 2 years, suspended for 5 years, ordered into

						SAF-P) 11-20-09 (modified into Fredonia House treatment center) 4-21-10 (modified to the House of Disciple Life Recovery Center) 1-15-14 (revoked for 2 years state jail)
21	Texas	188th District Court of Gregg County	44,098-A	Burglary of a Building	State Jail Felony	10-30-14 (1 year state jail)
24	Texas	County Court at Law of Gregg County	2009-1620	Criminal Trespass	Class B Misdemeanor	6-30-09

Thus Appellant had six prior felony convictions across three separate states. When a defendant has numerous prior felony convictions, the improper admission of prior misdemeanor offenses is very unlikely to improperly affect the verdict. See *Green v. State,* No. 01-01-01129-CR, 2003 Tex. App. LEXIS 1577 at 6-7 (Tex. App.-Houston [1st Dist.] 2003, pet. ref'd.)(mem. op. not designated for publication)(finding no harm in the

improper admission of three misdemeanor convictions when the defendant was shown to have numerous felony convictions.) This is only logical. Felonies are generally considered to be much more serious offenses than misdemeanors, so naturally evidence of prior felonies should have a much stronger impact on a sentencing authority than evidence of prior misdemeanors. Thus is not believable that evidence of two misdemeanor offenses would have swayed the trial court when it already had evidence of six prior felony offenses (including most notably a previous burglary offense.) [State's Exhibit 21].

Appellant's other prior criminal history also established that Appellant was unlikely to respond well to any rehabilitative effort as those judgments also established that Appellant had failed on community supervision both in Missouri [State's Exhibit 18, page 6] and in Texas [State's Exhibit 20]. Moreover, State's Exhibit 20 also showed that on that particular community supervision, Appellant was given multiple chances for rehabilitation as he went from deferred adjudication, to regular community supervision (with SAF-P), to being modified to the Fredonia House treatment center, to being modified to the House of Disciple Life Recovery Center, before finally being revoked and sent to a state jail facility. [State's Exhibit 20]. Given that Appellant's own closing argument emphasized Appellant's need for

rehabilitation [RR-IV-211-212], evidence that Appellant had already twice before failed on felony probation and had been given numerous opportunities on those prior probations to receive drug rehabilitation treatment would obviously be strong evidence showing that rehabilitation would not work in this case and that Appellant needed to be confined for the safety of the public.

Appellant was also shown to belong to the Aryan Brotherhood [RR-IV-181-182], a violent, white supremacist gang that was established to be a threat to the community at large. [RR-IV-182-183]. Evidence of gang affiliation is relevant at punishment to show the character of the accused. See *Jones v. State,* 944 S.W.2d 642, 653 (Tex. Crim. App. 1996). Thus this evidence too would be extremely powerful inculpatory evidence, marking Appellant as a dangerous man who needed to be incarcerated for the safety of the public at large.

Thus with there being evidence that Appellant had committed a particularly heinous burglary which had inflicted serious financial and psychological harm on the victims, that Appellant had a substantial prior criminal record of five other felonies (including another burglary), evidence that Appellant was unlikely to respond favorably to rehabilitative efforts, and evidence that Appellant belonged to a violent, white supremacist gang,

there was clearly overwhelming evidence that supported the trial court's punishment verdict. Conversely, State's Exhibits 22 and 23 were clearly of minor probative value as they were records of misdemeanor offenses and did not establish anything about Appellant's character or propensity for criminal activity which had not already been fully established by the other evidence that was properly admitted.

State's Exhibits 22 and 23 were both judgments of non-violent property crime misdemeanor offenses (State's Exhibit 22 being the record of a prior theft conviction and State's Exhibit 23 being the record of a prior forgery conviction). Non-violent, property crime misdemeanors are not particularly inflammatory and thus are unlikely to have a significant effect on a sentencing authority.

Furthermore given the abundant other evidence presented against Appellant, State's Exhibits 22 and 23 did not shed any new light on Appellant's character or propensity to commit crimes. While those documents did show that Appellant was willing to commit property offenses, that aspect of Appellant's character had already been fully established by both the evidence of the primary offense (showing Appellant had committed a burglary of a habitation) and also by State's Exhibit 18 (which showed Appellant had been previously convicted of three felony forgery offenses),

State's Exhibit 20 (which showed Appellant had been previously convicted of a felony theft), and State's Exhibit 21 (which showed Appellant had been previously convicted of burglary of a building). Thus State's Exhibits 22 and 23 did not establish anything of significance which had not already been established by other evidence which in turn makes it even less likely that these exhibits had any impact on the trial court's sentence.

In its holding the Court of Appeals argues that the trial court's comments when pronouncing sentence suggest that the trial court did take into account State's Exhibits 22 and 23 when assessing sentence (presumably a reference to the trial court mentioning that Appellant "had other chances before" and that "other states" had given him chances. *Barnes*, No. 06-19-00045-CR at 13). This argument is unpersuasive though as the record shows that Appellant was placed on numerous other community supervisions than just those documented in State's Exhibit 22 and 23 including a prior felony community supervision in Missouri [State's Exhibit 18], a prior felony community supervision in Illinois [State's Exhibit 19], and a prior felony community supervision in Texas. [State's Exhibit 20]. Thus there is no logical reason to believe the trial court was referencing State's Exhibits 22 and 23 rather than State's Exhibits 18, 19, and 20.

Conversely, there is compelling reason to believe the trial court was referring to Appellant's prior felony community supervisions in that instance. The trial court's comments occurred after Appellant's defense counsel had made a closing argument which specifically emphasized Appellant's need for drug treatment and referenced Appellant's prior time at a SAF-P facility. [RR-IV-211-212]. It is logical to conclude that the trial court (in referencing Appellant's past opportunities for rehabilitation) was addressing that argument from Appellant and if so then it is far more likely that the trial court was referring to Appellant's prior Illinois community supervision (which actually was for a drug offense) [State's Exhibit 19] and Appellant's prior Texas community supervision which involved Appellant receiving in-patient treatment at both SAF-P [State's Exhibit 20, pages 8-11] and a residential treatment center (Fredonia House) [State's Exhibit 20, pages 12-15] after which he stayed at the House of Disciples Life Recovery Center [State's Exhibit 20, page 16], than that the trial court was referring to two misdemeanor probations which did not involve drug offenses and about which no details of the probation were offered at trial [RR-IV; State's Exhibits 22-23]. Thus there is fair assurance that the trial court's comment when assessing punishment had nothing to do with State's Exhibits 22 and 23 but was instead a reference to the numerous other opportunities

(documented in State's Exhibits 19 and 20) that Appellant had to obtain drug treatment.

It is also highly significant that the Court of Appeals' holding entirely failed to acknowledge the trial court's description of Mr. Minshew's testimony. *Barnes,* No. 06-19-00045-CR at 12. This seems a rather remarkable oversight since the trial court's description (analogizing Mr. Minshew's testimony to that of a victim of a sexual assault) [RR-IV-215] plainly shows that the trial court was greatly affected by Mr. Minshew's testimony and considered that above all else in accessing the sentence in this case, and certainly a victim traumatized to the level consistent with that of victims of sexual abuse is of the utmost compelling evidence and makes it impossible to believe the trial court, when faced with such evidence, was influenced at all by the comparatively trivial evidence that ten years ago Appellant received two non-violent misdemeanor convictions.

A trial court's verdict is not to disturbed over the improper admission of evidence when there was otherwise overwhelming evidence to support the verdict. See *Prior v. State,* 647 S.W.2d 956, 959-960 (Tex. Crim. App. 1983). In this case there was overwhelming evidence beyond State's Exhibits 22 and 23 that fully supported the trial court's verdict, and thus it is clear that the improper admission of State's Exhibit 22 and 23 did not have

any substantial and injurious effect or influence in determining the verdict. As such any error from the admission of those two documents was harmless and should have been disregarded. For the Court of Appeals to conclude otherwise was thus a radical departure from accepted and usual court proceedings that warrants being reversed by the Court of Criminal Appeals.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the State prays that this Honorable Court reverse the judgment of the Court of Appeals and affirm the judgment and sentence of the trial court.

Respectfully submitted,

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ATTORNEYS FOR THE APPELLEE,
THE STATE OF TEXAS

CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), I, Brendan Wyatt Guy, Assistant Criminal District Attorney, Victoria County, Texas, certify that the number of words in Appellee's Brief submitted on December 13, 2019, excluding those matters listed in Rule 9.4(i)(3) is 3,532.

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CERTIFICATE OF SERVICE

I, Brendan Wyatt Guy, Assistant Criminal District Attorney, Gregg County, Texas, certify that a copy of the foregoing brief was sent by electronic mail to Mr. Jeff Jackson, Attorney for Appellant, Daniel Thomas Barnes, and by United States mail to Ms. Stacy M. Soule, P. O. Box 13046, Capitol Station, Austin, Texas 78711, State Prosecuting Attorney, on this the 13th day of December, 2019.

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